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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. 288

T. H. REITER,

Petitioner,

vs.

ERNEST PALMER (IMPLEADED WITH ILLINOIS NATIONAL CASUALTY COMPANY, AN ILLINOIS CORPORATION, CLAUDE H. BARR AND ARTHUR M. FITZGERALD),

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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To the Honorable the Chief Justice of the Supreme Court of the United States and the Associate Justices:

In opposition to the petition for writ of certiorari herein, respondent, Ernest Palmer, presents the following:

1. The Petition Does Not Specify the Stage of the Proceedings Nor the Manner in Which Any Alleged Federal Question Sought to Be Reviewed Was Raised.

The petition therefore does not comply with the requirements of Rule 12, paragraph 1, nor Rule 38, paragraph 2.

Rule 12, paragraph 1, requires that when review of a State Court judgment is sought by petition for writ of certiorari, the provisions of the second paragraph of para-

graph 1 must be complied with. Rule 38, paragraph 2, states that a failure to comply with the requirements of Rule 12, paragraph 1 will be sufficient reason for denying the petition.

These rules require a summary and short statement of the matter involved. The twenty page statement at the outset of the petition fails to summarize, abridge, or clearly state those matters which petitioner considers to be involved in this proceeding.

But, aside from this failure of compliance, petitioner has wholly failed to regard the provisions of the second paragraph of Rule 12, paragraph 1, that he shall specify the stage in the proceedings in the court of first instance and in the appellate court at which, and the manner in which, the alleged Federal questions sought to be reviewed were raised. This is a "must" requirement.

Upon page 6 of the petition it is stated that certain actions of the respondent there complained of were "All without any or due process of law as provided for in Article V of the Amendments to the Constitution of the United States, and Section 2 of Article II and Section 19 of Article II of the Constitution of Illinois."

On page 3 a reference is made to Article IV, Section 13, of the Constitution of Illinois, without stating that it is involved, or how it is involved.

But at what stage in the proceedings and the manner in which these questions are claimed to have been raised is not stated.

The record shows that they were not raised in the trial court (the Superior Court of Cook County, Illinois) and that the only mention in that court of the State Constitution, or of any Constitution, is at R. 568, where it appears that after a hearing before a Master in Chancery of the

Superior Court of Cook County, petitioner stated, among many objections (number 42) to the Master's Report, that the Master erred in "overlooking the maxim that no one should depart from a court of chancery without a remedy, and also overlooked Article II, Section 19, of the Constitution of the State of Illinois." This Section 19 of Article II is that paragraph of the Bill of Rights which provides that every person ought to have a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation, and ought to obtain by law, right and justice freely, and without being obliged to purchase it, completely and without denial, promptly, and without delay.

While this Section, as above stated, is mentioned on page 6 of the petition, nothing is said by petitioner as to when or how any question under it was raised.

It appears that the objections, including this number 42, to the Master's Report were overruled, but it does not appear that any specific exceptions were taken before the Master or in the trial court to such overruling (R. 575). The record shows (R. 577) that the decree of the Superior Court "ratified, confirmed, sustained and approved" the Master's Report and that the exceptions of the plaintiff thereto were each and all overruled and disallowed. These exceptions were by the decree stated (R. 575) to be the objections of the plaintiff to the Master's Report. Nothing else appears in the record as to any action taken by petitioner or requested by petitioner with respect to the general reference just quoted to the Bill of Rights.

Hence the petition fails of compliance with Rule 12.

2. If There Was Any Federal Question Properly Raised in the Court of First Instance, It Was Waived by Petitioner.

Under the heading "The Questions Presented" (Pet'n, p. 22), petitioner's points with a single exception (Point XII) allege a violation of petitioner's Constitutional rights.

Article VIII, Section 75, paragraph 1, of the Civil Practice Act of Illinois provides that appeals shall be taken directly to the Supreme Court (of Illinois) in all cases in which the validity of a statute or a construction of the Constitution is involved.

The record shows (R. 22, opinion of the Appellate Court of Illinois, and R. 578) that plaintiff took his appeal instead to the Appellate Court of Illinois.

The Illinois decisions hold, *first*, (see *Economy Dairy Co.* v. *Kerner*, 371 Ill. 261, 262):

> "Before this court will take jurisdiction of an appeal on the ground that a constitutional question is involved, it must appear from the record that a fairly debatable constitutional question was alleged in the trial court, the ruling on it must be preserved in the record for review, and error must be assigned upon it here. (Citing cases.) The mere assertion that a constitutional question is involved or a constitutional right has been invaded, is not sufficient, in the absence of other grounds, to confer jurisdiction."

and, *second*, that if it is desired on appeal to raise a constitutional question, the appeal must be taken directly to the Supreme Court, and if the appeal is instead taken to the Appellate Court, such appeal constitutes a waiver of the constitutional question.

Brandtjen v. *Forgue*, 299 Ill. App. 585. The court said (p. 589):

> "Any constitutional questions have been waived

by appealing to this court. Such questions can be raised only by direct appeal to the Supreme Court."

See *People* v. *Billow*, 377 Ill. 236, 239; and see also *Simon* v. *Reilly*, 321 Ill. 431, 434.

And this court, in *Central Union Company* v. *Edwardsville*, 269 U. S. 190 held it had no jurisdiction to review a judgment of the Supreme Court of Illinois refusing to pass on a constitutional question which had been waived by taking an appeal to the Appellate Court of Illinois instead of to the Supreme Court.

3. Where a Constitutional Question Has Been Waived in the State Court, This Court Will Not Consider Nor Decide It.

See *McGoldrick* v. *Compagnie Generale*, 309 U. S. 430, 434; *Duignan* v. *United States*, 274 U. S. 195, 200; and *Central Union Company* v. *Edwardsville*, 269 U. S. 190, 195.

4. Petitioner Asks (pp. 24, 25, 26, 33) That This Court Review the Action of the Supreme Court of Illinois in Holding That There Are No Facts to Sustain a Judgment Against Respondent Palmer. The Court Will Not Do This.

This Court will not consider nor decide questions of fact where they are not necessarily involved in the decision of a constitutional question properly raised. There is no such question here before the court.

See *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86, 97; *Grayson* v. *Harris*, 267 U. S. 352, 357.

It is respectfully submitted that the petition for certiorari should be denied.

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